FILED

No. 97-1218 JAN 23 1998

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

NATIONAL STEEL AND SHIPBUILDING COMPANY,

Petitioner,

vs.

OSCAR SMITH; MARK DRISCOLL; JOHN PARASKEVOPOULOS; GEORGE LOPEZ; JUAN P. CUBILLAS; JUAN MARQUEZ; MICHAEL RAY NASH; HECTOR MANUEL NAVARRO; STEVE HARDING; IRMA CAMACHA; LUIS BARCELO DURAZO; WILLIAM N. JORDAN; STANLEY E. TURNER; ROMEO DELEON; FRANCISCO BARRON; OSCAR NEVARAZ; ROBERT J. GILL; EDUARDO LENCIONI; PERRY MASTAW; ANTONIO MORALEZ; RODNEY RAMSEYER; MARIO CASTRO; and NORRIS FISHMAN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

VAN ALLYN GOODWIN
LITTLER MENDELSON, P.C.
701 "B" Street, 13th Floor
San Diego, California 92101
(619) 232-0441

Counsel of Record

WILLIAM C. WRIGHT
THEODORE R. SCOTT
LITTLER MENDELSON, P.C.
701 "B" Street, 13th Floor
San Diego, California 92101
(619) 232-0441

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

51pp

QUESTION PRESENTED FOR REVIEW

Whether the *Garmon* preemption doctrine is applicable to federal statutory claims that are premised upon alleged conduct which arguably constitutes an unfair labor practice under Section 8 of the National Labor Relations Act.

PARTIES TO THE PROCEEDINGS BELOW

Oscar Smith, Mark Driscoll, John Paraskevopoulos, George Lopez, Juan P. Cubillas, Juan Marquez, Michael Ray Nash, Hector Manuel Navarro, Steve Harding, Irma Camacha, Luis Barcelo Durazo, William N. Jordan, Stanley E. Turner, Romeo Deleon, Francisco Barron, and Oscar Nevarez, Robert J. Gill, Eduardo Lencioni, Perry Mastaw, Antonio Moralez, Rodney Ramseyer, Mario Castro, Norris Fishman, Respondents herein, filed the underlying civil actions in this matter.

Petitioner National Steel and Shipbuilding Company is a wholly-owned subsidiary of NASSCO Holdings Incorporated. There are no other parent or subsidiary companies to list pursuant to Rule 29.6.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS BELOW..... ii

OPINIONS BELOW..... 1

STATEMENT OF JURISDICTION..... 1

STATUTORY PROVISIONS INVOLVED..... 2

STATEMENT OF THE CASE..... 2

Statement of Facts..... 2

Proceedings Below 3

Existence of Jurisdiction Below 5

REASONS FOR GRANTING THE PETITION..... 6

The Court Of Appeals' Decision Conflicts With The Decisions Of This Court And Other Courts Of Appeals On An Important Question Of Federal Law 6

The Court Of Appeals Has Decided An Important Question Of National Labor Policy In A Way That Conflicts With Relevant Decisions Of This Court ... 8

CONCLUSION 14

APPENDICES

Appendix A
Opinion, United States Court of Appeals for the Ninth Circuit.....App. 1

Appendix B
Order, United States Court of Appeals for the Ninth Circuit.....App. 15

TABLE OF CONTENTS – Continued

Page

Appendix C
Order Granting Defendant's Motion for Judgment on the Pleadings, United States District Court for the Southern District of California ..... App. 17

Appendix D
Relevant Statutory Provisions ..... App. 24

TABLE OF AUTHORITIES

Page(s)

CASES

Amalgamated Ass'n of Street, Electric Railway and Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971) 9, 12

Bassette v. Stone Container Corp., 25 F.3d 757 (9th Cir. 1994) 4, 12

Brennan v. Chestnut, 777 F. Supp. 1469 (D. Minn. 1991), *aff'd*, 973 F.2d 644 (8th Cir. 1992) 7

Butchers' Union Local No. 498 v. SDC Investment, Inc., 631 F. Supp. 1001 (E.D. Cal. 1986), *aff'd*, 788 F.2d 535 (9th Cir. 1986) 7

Caldwell v. American Basketball Ass'n, Inc., 66 F.3d 523, 530 (2d Cir. 1995) 13

Chamber of Commerce v. Reich, 74 F.3d 1322 (D.C. Cir. 1996), *reh'g denied*, 83 F.3d 442 (D.C. Cir. 1996) 7

Chaulk Services, Inc. v. Massachusetts Commission Against Discrimination, 70 F.3d 1361 (1st Cir. 1995) 12, 13

Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616 (1975) 6, 10

Crown Clothing Co. v. Papale, 854 F.Supp. 316 (D. N.J., 1994) 7

Garner v. Teamsters Local Union No. 776, 346 U.S. 485 (1953) 8

Hobbs v. Hawkins, 968 F.2d 471 (5th Cir. 1992) 7

Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., Inc., 779 F.2d 497 (9th Cir. 1985), *aff'd*, 484 U.S. 539 (1988) 7, 10, 12

TABLE OF AUTHORITIES – Continued

Page(s)

Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724, 748 (1985) 12

MHC, Inc. v. Int'l Union, United Mine Workers, 685 F. Supp. 1370 (E.D. Ky. 1988) 7

Morgan v. Massachusetts General Hospital, 901 F.2d 186 (1st Cir. 1990) 7

New Bedford Fishermen's Welfare Fund v. Baltic Enterprises, Inc., 813 F.2d 503, 504-505 (1st Cir. 1987), *cert. denied*, 485 U.S. 904 (1988) 7

San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) 4

Talbot v. Robert Matthews Distributing Co., 961 F.2d 654 (7th Cir. 1992) 7

Tamburello v. Comm-Tract Corp., 67 F.3d 973 (1st Cir. 1995) (RICO), *cert. denied*, 116 S. Ct. 1852 (1996) 7

Vaca v. Sipes, 386 U.S. 171 (1967) 10

RULES

Rules of the Supreme Court of the United States Rule 13 2

STATUTES

Americans with Disabilities Act (42 U.S.C. § 12101 *et seq.*) 2, 4

National Labor Relations Act (29 U.S.C. § 151 *et seq.*) ..... *passim*

National Labor Relations Act, sec. 7 (29 U.S.C. § 157) 8, 12

TABLE OF AUTHORITIES – Continued

Page(s)

National Labor Relations Act, sec. 8 (29 U.S.C. § 158) 6, 8, 12

United States Code, Title 28, sec. 1254(l) 2

United States Code, Title 28, sec. 1291 6

United States Code, Title 28, sec. 1331 ..... 4, 5

United States Code, Title 28, sec. 1441(b) 3, 5

United States Code, Title 28, sec. 1446 ..... 3, 5

United States Code, Title 42, sec. 12201(b) 10

PETITION FOR A WRIT OF CERTIORARI

Petitioner National Steel and Shipbuilding Company (hereinafter referred to as "Petitioner" or "NASSCO") respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is officially reported at 125 F.3d 751 (9th Cir. 1997) and is set forth in Appendix A, App. 1-16.

The Order of the United States Court of Appeals for the Ninth Circuit denying the petition for rehearing with suggestion for rehearing *en banc* is unpublished and set forth in Appendix B, App. 15-16.

The opinion of the United States District Court for the Southern District of California in *Smith, et al. v. National Steel and Shipbuilding Company*, Civil No. 94-1029-JSR, consolidated with *Gill, et al. v. National Steel and Shipbuilding Company*, Civil No. 94-1482, which was reviewed by the Court of Appeals, is unpublished and set forth in Appendix C, App. 17-23.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on September 9, 1997.

The Court of Appeals denied a timely petition for rehearing and suggestion for rehearing *en banc* on October 28, 1997. *See* Appendix B, App. 15-16.

The jurisdiction of this Court is invoked under Title 28 of the United States Code, section 1254(1), and Rule 13 of the Supreme Court of the United States.

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the National Labor Relations Act, as amended [29 U.S.C. § 151 *et seq.*] (hereinafter referred to as the "NLRA"), and the Americans with Disabilities Act [42 U.S.C. § 12101 *et seq.*] (hereinafter referred to as the "ADA") are set forth in Appendix D, App. 24-29.

STATEMENT OF THE CASE

STATEMENT OF FACTS

Respondents are production and maintenance employees who were temporarily laid off by NASSCO between May 1, 1993, and July 15, 1994. They allege that they were improperly "low rated" and selected for layoff by NASSCO because of physical disabilities or medical conditions in violation of the terms of a performance rating system that was unilaterally but lawfully implemented in April 1993, after NASSCO had reached a collective bargaining impasse with the various labor unions (hereinafter "Unions") that represent NASSCO employees, including Respondents.

The layoff of NASSCO employees had been previously based solely on seniority. NASSCO replaced the

seniority policy with the Performance Evaluation and Communication Program ("PECP"), which was used to determine who should be laid off during slack employment. The PECP provides in relevant part:

> A light or restricted duty employee who is doing work within his or her trade's job description, will be rated just as any other employee. An employee who is working outside of his/her trade's job description due to limitations or restrictions imposed by his/her doctor, will be frozen until he/she resumes work in his/her trade.

Respondents allege, *inter alia*, that they "are physically handicapped or disabled persons;" that they were "assigned to light duty outside of [their] usual job class because of medical restrictions imposed by [their] physicians;" and that they were "low rated" in violation of the PECP, which provides that "no rating will be issued for an injured worker who is on 'light duty' outside of his normal job classification . . . " Respondents thus conclude and allege that NASSCO violated the terms of the PECP.

PROCEEDINGS BELOW

This case involves two consolidated civil actions stemming from the temporary layoff of Respondents. The first action was filed by Oscar Smith, *et al.*, in the San Diego County Superior Court on June 15, 1994. NASSCO removed this action to the United States District Court for the Southern District of California on July 1, 1994, on the basis of federal question jurisdiction pursuant to Title 28 of the United States Code, sections 1441(b) and 1446. The

second action was filed by Robert Gill, *et al.*, in the United States District Court for the Southern District of California on September 26, 1994. The jurisdiction of the District Court was invoked under the ADA and under Title 28 of the United States Code, section 1331 (original federal question jurisdiction). By stipulation of the parties, both cases were consolidated.

On January 23, 1996, the District Court granted NASSCO's motion for judgment on the pleadings. *See* Appendix C, App. 17-23. The District Court concluded that Respondents' allegation that NASSCO had failed to abide by and breached the terms of the PECP was in legal effect a claim that NASSCO made a unilateral change in terms or conditions of employment without first negotiating and reaching an impasse with the Unions. Applying the NLRA preemption doctrine established by this Court in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), the District Court held that such conduct, if true, would **arguably** constitute an unfair labor practice under the NLRA and, therefore, that Respondents' claims fell within the exclusive jurisdiction of the National Labor Relations Board ("NLRB"). *See Bassette v. Stone Container Corp.*, 25 F.3d 757, 760 (9th Cir. 1994). The District Court noted that Respondents "concede that their claims would arguably be preempted by the NLRA had they been ~~based~~ **solely** on a state law claim . . . " App. 21 n.2 (emphasis added). However, the District Court emphasized that "the fact that [Respondents] also allege federal claims does not change the preemption analysis under *Garmon*." *Id.*

A timely Notice of Appeal from the Judgment of the District Court was filed by Respondents on or about February 21, 1996. Respondents did not challenge the District Court's decision insofar as it held that Respondents' state law claims were preempted by the NLRA. *See* 125 F.3d at 753 n.1 (App. 3 n.1).

On September 9, 1997, the Court of Appeals issued its published opinion reversing the District Court. *See* Appendix A, App. 1-14. The Court of Appeals concluded that "where the 'conflict' is between two federal statutes, *Garmon* preemption is inapplicable . . . "[1] 125 F.3d at 756 (App. 11). The Court of Appeals also noted that "[w]hether *Garmon* preemption should be extended to preempt a federal, rather than a state, claim is **an issue of first impression** in this circuit . . . " *Id.* at 755 (App. 8).

NASSCO filed a timely Petition for Rehearing with Suggestion for Rehearing *En Banc* with the Court of Appeals on or about September 25, 1997. The Court of Appeals denied the petition for rehearing on October 28, 1997. *See* Appendix B, App. 15-16.

EXISTENCE OF JURISDICTION BELOW

The District Court had jurisdiction over the federal claims alleged by Respondents' Complaints hereinbelow under Title 28 of the United States Code, sections 1331, 1441(b) and 1446. The Court of Appeals had appellate

[1] One of the "two federal statutes" must be the NLRA.

jurisdiction under Title 28 of the United States Code, section 1291.

REASONS FOR GRANTING THE PETITION

The Court Of Appeals' Decision Conflicts With The Decisions Of This Court And Other Courts Of Appeals On An Important Question Of Federal Law.

This petition for a writ of certiorari should be granted because the Court of Appeals' Opinion conflicts with the decisions of this Court and other courts of appeals concerning the scope and applicability of the *Garmon* preemption doctrine. In *Garmon, supra,* this Court declared that "[w]hen **an activity** is arguably subject to Section 7 or Section 8 of the [NLRA], the state as well as **the federal courts must defer** to the exclusive competence of the NLRB." 359 U.S. at 245 (emphasis added).

Here, the Court of Appeals noted that "[w]hether *Garmon* preemption should be extended to preempt a federal, rather than a state, claim is an issue of first impression in this circuit." 125 F.3d at 755 (App. 8). It then held that "where the 'conflict' is between two federal statutes, *Garmon* preemption is inapplicable . . . " *Id.* at 756 (App. 11).

The Court of Appeals' holding is contrary to this Court's decision in *Garmon,* as well as with the decisions of other federal courts of appeals which, for nearly 40 years, have applied *Garmon* preemption where there was a conflict between the NLRA and another federal statute. *See, e.g., Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100,* 421 U.S. 616 (1975) (Sherman

Act); *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., Inc.*, 779 F.2d 497 (9th Cir. 1985), *aff'd*, 484 U.S. 539 (1988) (ERISA and Section 301 of Labor-Management Relations Act); *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996), *reh'g denied*, 83 F.3d 442 (D.C. Cir. 1996) (Executive Order 12954); *Hobbs v. Hawkins*, 968 F.2d 471, 475-479 (5th Cir. 1992) (Civil Rights Act of 1871); *Morgan v. Massachusetts General Hospital*, 901 F.2d 186 (1st Cir. 1990) (Title VII); *New Bedford Fishermen's Welfare Fund v. Baltic Enterprises, Inc.*, 813 F.2d 503, 504-505 (1st Cir. 1987), *cert. denied*, 485 U.S. 904 (1988); *Talbot v. Robert Matthews Distributing Co.*, 961 F.2d 654, 659-661 (7th Cir. 1992) (RICO); *Tamburello v. Comm-Tract Corp.*, 67 F.3d 973, 976 n.2 (1st Cir. 1995) (RICO), *cert. denied*, 116 S. Ct. 1852 (1996). In addition, district courts have also applied *Garmon* to conflicting federal claims. *See, e.g., Brennan v. Chestnut*, 777 F. Supp. 1469, 1473-1475 (D. Minn. 1991), *aff'd*, 973 F.2d 644 (8th Cir. 1992) (RICO); *Butchers' Union Local No. 498 v. SDC Investment, Inc.*, 631 F. Supp. 1001, 1005-1011 (E.D. Cal. 1986), *aff'd*, 788 F.2d 535 (9th Cir. 1986) (RICO); *Crown Clothing Co. v. Papale*, 854 F. Supp. 316, 320 (D. N.J., 1994) (ERISA); *MHC, Inc. v. Int'l Union, United Mine Workers*, 685 F. Supp. 1370, 1374-80 (E.D. Ky. 1988) (RICO).

The Court of Appeals' Opinion conflicts with the decisions of this Court and other federal courts of appeals that have applied traditional principles of *Garmon* pre-emption when the conflict is between the NLRA and another federal statute **and** the conduct alleged was, as here, "arguably protected or prohibited" by the NLRA. Accordingly, this Court should grant NASSCO's petition for a writ of certiorari.

The Court Of Appeals Has Decided An Important Question Of National Labor Policy In A Way That Conflicts With Relevant Decisions Of This Court.

The Court of Appeals' Opinion essentially repudiates the fundamental national labor policy established by Congress and this Court in *Garmon*. It also divests the NLRB of exclusive jurisdiction over activity that is arguably prohibited by Section 8 of the NLRA [29 U.S.C. § 158]. Thus, this petition for writ of certiorari should be granted because the issues presented are of exceptional importance and have national implications upon federal labor law.

In *Garmon*, this Court recognized that "Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience." 359 U.S. at 242. Thus, by enacting the NLRA, "Congress did not merely lay down a substantive rule to be enforced by any tribunal competent to apply law generally to the parties." *Id.* (quoting *Garner v. Teamsters Local Union No. 776*, 346 U.S. 485, 490-91 (1953)). Instead, Congress gave "primary interpretation and application of [the NLRA] to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative review." *Garner*, 346 U.S. at 490.

This Court declared in *Garmon* that all determinations concerning the protection of employees' rights under Section 7 [29 U.S.C. § 157] and the adjudication of unfair labor practices under Section 8 of the NLRA are within the exclusive jurisdiction of the NLRB. The

Supreme Court emphasized that "courts are not the primary tribunals to adjudicate such issues" and that "[i]t is essential to administration of the [NLRA] that these determinations be left in the first instance to the [NLRB]." *Garmon*, 359 U.S. at 244-245. This Court has also recognized that such exclusivity was necessary because "[a] multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." *Garner*, 346 U.S. at 490-491.

In *Amalgamated Ass'n of Street, Electric Railway and Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971), this Court clarified its holding in *Garmon* and explained why Congress chose to grant exclusive control over national labor law to the NLRB instead of sharing that power with the federal courts:

> The principle of preemption that informs our general national labor law was born of the Court's efforts, without the aid of explicit congressional guidance, **to delimit state and federal judicial authority** over labor disputes in order to preclude, as far as reasonably possible, conflict between the exertion of judicial and administrative power in the attainment of the multi-faceted policies underlying the federal scheme.
>
> * * *
>
> The rationale for [NLRA] preemption, then, rests in large measure upon our determination that when it set down a federal labor policy Congress . . . sought as well to restructure fundamentally the processes for effectuating that policy, deliberately placing the responsibility for

> applying and developing this comprehensive legal system in the hands of an expert administrative body **rather than the federalized judicial system.**

Id. at 286, 288 (emphasis added).

The Supreme Court also acknowledged that federal courts are "ill-equipped" to displace the role of the NLRB. *Id.* at 289-290. Thus, although "[t]here are situations in which district judges must occasionally resolve labor law issues . . . they surely represent the exception rather than the rule." *Advanced Lightweight Concrete*, 484 U.S. at 552, n.19. This Court has, therefore, recognized few exceptions to *Garmon*: where the alleged conduct is only of "peripheral concern" to federal labor policy, *Garmon*, 359 U.S. at 243; where the alleged conduct touches interests which are "deeply rooted in local feeling and responsibility," *id.* at 244; where Congress has expressly carved out an exception to the NLRB's primary jurisdiction,[2] *Vaca v. Sipes*, 386 U.S. 171, 179-180 (1967); and where labor law issues emerge as "collateral issues" in suits brought under statutes which provide an independent federal remedy, *Connell Construction, supra.* A "potential conflict between two federal statutes" has not been recognized or suggested by this Court as an exception to the *Garmon* preemption doctrine. Nor has this Court limited the application of *Garmon* preemption **solely** to state claims.

---

[2] Congress did not carve out a similar exception in the ADA. To the contrary, the ADA expressly provides that none of its provisions "shall be construed to invalidate or limit the remedies, rights and procedures of any Federal law . . . " 42 U.S.C. § 12201(b).

The Court of Appeals' Opinion concludes "that *Garmon* preemption originates from the Supremacy Clause of the United States Constitution, and that this provision is only implicated when a case involves a conflict between a federal and a state law." 125 F.3d at 755 (App. 7-8). Thus, according to the Court of Appeals, "[n]o such constitutional concerns are implicated when a federal statute prescribing [sic] discriminatory action is said to impinge upon the primary jurisdiction of the NLRB." *Id.* at 756 (App. 12).

By addressing **only** the Supremacy Clause as a basis for the *Garmon* preemption doctrine, the Court of Appeals' Opinion ignores the paramount rationale recognized by this Court – the primary jurisdiction of the NLRB to foster, develop and apply a **uniform** substantive federal labor law. The NLRB's primary jurisdiction to hear claims that implicate the NLRA obviously applies with equal force to both state and federal claims because the concern for national uniformity exists in both instances. It matters not whether a violation of state or federal law is alleged because, when NLRA Section 7 or 8 issues are arguably implicated, the national uniformity concerns and jurisdictional principles underlying *Garmon* are identical.

Rather than focusing on the underlying **conduct** alleged and whether it is "arguably protected or prohibited" by the NLRA, the Court of Appeals' Opinion rejects *Garmon* preemption simply because "federal claims" are alleged. Yet this Court has consistently emphasized that "[i]t is the **conduct** being regulated, not the formal description of governing legal standards, that is the proper focus of concern" for determining whether NLRA

preemption applies. *Lockridge*, 403 U.S. at 292 (emphasis added). *See also Chaulk Services, Inc. v. Massachusetts Commission Against Discrimination*, 70 F.3d 1361, 1365 (1st Cir. 1995) ("focus [is] on the conduct at the root of the controversy . . . as opposed to the descriptive title" given to the cause of action).

The Court of Appeals essentially reverses the *Garmon* analysis. Instead of **initially** determining whether the conduct is "arguably protected or prohibited," the Court of Appeals instructs federal courts to **first** determine if a federal claim is plead and, if so, "*Garmon* preemption is inapplicable . . . " 125 F.3d 756 and 757 (App. 9 and 11) even though the conduct arguably violates Section 8 of the NLRA.[3] Thus, the Court of Appeals holds that there is no reason to consider either the alleged conduct or national labor policy when conflicting federal claims are presented.

The Court of Appeals' Opinion permits federal courts to exercise jurisdiction over alleged Section 7 and 8 **conduct** which falls squarely within the authority entrusted by Congress and this Court to the NLRB. The purpose of *Garmon* preemption is to "protect the primary jurisdiction of the NLRB to determine **in the first instance** what kind of conduct is either prohibited or protected by the NLRA." *Metropolitan Life Insurance Co. v. Massachusetts,*

---

[3] The ADA discrimination alleged by Respondents is premised on a threshold determination that NASSCO engaged in **conduct** that arguably violates Section 8 of the NLRA; that is, that NASSCO violated the implemented PECP without having first reached a collective bargaining impasse. *See Advanced Lightweight Concrete, supra; Bassette v. Stone Container Corp.*, 25 F.3d 757, 760 (9th Cir. 1994).

471 U.S. 724, 748 (1985). However, under the Ninth Circuit's holding the NLRB will be unable **in the first instance** to address arguable unfair labor practice issues "when the NLRA potentially conflicts with another federal statute." 125 F.3d at 755 (App. 9).

Moreover, the Court of Appeals' Opinion encourages litigants to artfully plead a federal statutory claim in order to evade *Garmon* preemption and the primary jurisdiction of the NLRB. As the Court of Appeals for the First Circuit recognized in *Chaulk Services, supra,* permitting a plaintiff to proceed "by simply artfully pleading [their] claim of unfair labor practices as one motivated by a discriminatory animus . . . would be compromising the NLRB's role as chief arbiter of labor disputes." 70 F.3d at 1370. *See also Caldwell v. American Basketball Ass'n, Inc.*, 66 F.3d 523, 530 (2d Cir. 1995) (using *Garmon* to preempt an antitrust claim under the Sherman Act because if the court allowed the action to proceed, employees would never resort to the NLRB or would file parallel administrative and antitrust proceedings that risked inconsistent adjudications); *Morgan*, 901 F.2d at 194 (to allow a plaintiff "to use the general civil rights statutes to protest alleged unfair labor practices would essentially render the NLRA nugatory, a result we are unwilling to countenance").

NASSCO's petition for a writ of certiorari should be granted because the issues presented are of exceptional importance and have national implications upon federal labor policy. The Court of Appeals' Opinion emasculates the primary jurisdiction of the NLRB and will create conflicting and inconsistent determinations in matters involving federal labor law, which Congress and this

Court intended to be uniformly developed and applied by an expert agency – the NLRB. Given the Court of Appeals' broad holding that the inclusion of federal claims in a complaint divests the NLRB of primary jurisdiction, the very purpose of having an expert administrative agency will be thwarted. Moreover, the responsibility for establishing and administering a uniform body of national substantive labor law will be shifted from the NLRB to the federal judiciary, contrary to Congressional intent and the precepts of *Garmon*.

CONCLUSION

For the reasons expressed hereinabove, NASSCO respectfully requests that its petition for a writ of certiorari be granted.

Respectfully submitted,

VAN ALLYN GOODWIN
LITTLER MENDELSON, P.C.
701 "B" Street, 13th Floor
San Diego, California 92101
(619) 232-0441

Counsel of Record

WILLIAM C. WRIGHT
THEODORE R. SCOTT
LITTLER MENDELSON, P.C.
701 "B" Street, 13th Floor
San Diego, California 92101
(619) 232-0441

Counsel for Petitioner

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OSCAR SMITH; MARK DRISCOLL; JOHN PARASKEVOPOULOS; GEORGE LOPEZ; JUAN P. CUBILLAS; JUAN MARQUEZ; MICHAEL RAY NASH; HECTOR MANUEL NAVARRO; STEVE HARDING; IRMA CAMACHO; IRMA DURAZO; WILLIAM N. JORDAN; STANLEY E. TURNER; ROMEO DELEON; FRANCISCO BARRON; OSCAR NEVAREZ; ROBERT J. GILL; EDUARDO LENCIONI; PERRY MASTAW; ANTONIO MORALEZ; RODNEY RAMSEYER; MARIO CASTRO; and NORRIS FISHMAN, *Plaintiffs-Appellants,* v. NATIONAL STEEL & SHIPBUILDING COMPANY, Does 1-500, inclusive, *Defendants-Appellees.*	No. 96-55281 D.C. No. CV-94-01029-JSR OPINION

Appeal from the United States District Court
for the Southern District of California
John S. Rhodes, Sr., District Judge, Presiding

Argued and Submitted
March 6, 1997 – Pasadena, California

Filed September 9, 1997

Before: James R. Browning and Andrew J. Kleinfeld, Circuit Judges, and Robert R. Merhige,* Senior District Judge.

COUNSEL

Irvin M. Zalkin, San Diego, California, for the plaintiffs-appellants.

William C. Wright and Van A. Goodwin, San Diego, California, for the defendant-appellee.

OPINION

MERHIGE, Senior District Judge:

Plaintiffs-Appellants ("Plaintiffs") are twenty-four former employees of Defendant-Appellee, National Steel & Shipbuilding Company ("NASSCO"). Plaintiffs brought two separate civil actions which were consolidated in the Southern District of California. The suits alleged that NASSCO's implementation of a new layoff policy violated the Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA") as well as the California Fair Employment and Housing Act, Cal. Gov't Code § 12940 *et seq.* ("FEHA"). Plaintiffs appeal the district court's granting NASSCO's motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). For the reasons which follow, we reverse.

---

* Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

I

FACTS AND PROCEDURAL HISTORY

Plaintiffs are former union employees of NASSCO who were laid off between May 1993 and July 1994. In January 1993, NASSCO adopted a performance-based rating system, the "Performance Evaluation and Communication Program" ("PECP"), to determine which of its employees should be laid off. Prior to the adoption of the PECP, layoffs at NASSCO had been determined on a seniority basis. In their suits, Plaintiffs alleged that they are disabled persons and that the PECP has been used by NASSCO to purposefully layoff disabled workers in violation of the ADA and FEHA.

NASSCO moved for judgment on the pleadings under Fed.R.Civ.P. 12(c) or in the alternative for summary judgment under Fed.R.Civ.P. 56 on the basis that Plaintiffs' claims are preempted by the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("NLRA"). The district court found that Plaintiffs' claims were preempted by the NLRA under the Supreme Court's decision in *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236 (1959), and therefore granted NASSCO's motion for judgment on the pleadings. Plaintiffs appeal the decision of the district court.[1]

---

[1] Plaintiffs do not argue on appeal that their state law claims under the FEHA survive preemption.

II

STANDARD OF REVIEW

This Court reviews *de novo* a Rule 12(c) judgment on the pleadings. *Merchants Home Delivery Serv. v. Hall & Co.*, 50 F.3d 1486, 1488 (9th Cir.), *cert. denied*, 116 S.Ct. 418 (1995); *Westlands Water Dist. v. Firebaugh Canal*, 10 F.3d 667, 670 (9th Cir. 1993). A judgment on the pleadings is properly granted when, taking all the allegations in the pleading as true, the moving party is entitled to judgment as a matter of law. *Merchants Home Delivery*, 50 F.3d at 1488; *Westlands*, 10 F.3d at 670.

III

DISCUSSION

A. Appellate Jurisdiction

As a threshold matter, NASSCO suggests that this Court may not have jurisdiction to hear Plaintiffs' appeal. Plaintiffs' Notice of Appeal incorrectly refers to a "Summary Judgment entered on January 24, 1996" when, in fact, the district court granted NASSCO's motion for judgment on the pleadings under Fed.R.Civ.P. 12(c). NASSCO submits that dismissal is warranted because Plaintiffs have failed to comply with Fed. R. App. P. 3(c) which requires that a notice of appeal "designate the judgment, order, or part appealed from."

We find NASSCO's argument to be without merit as the rules also provide that "[a]n appeal will not be dismissed for informality of form or title of the notice of appeal." Fed. R. App. P. 3(c). Accordingly, we reject

NASSCO's contention and will consider the merits of this appeal.

B. Preemption under *Garmon*

The NLRA preempts any claim for relief based on conduct which is protected or prohibited by its provisions. *Garmon*, 359 U.S. 236. In *Garmon*, the Supreme Court pronounced a general rule concerning the preemptive effect of the NLRA and the parameters of the primary jurisdiction of the National Labor Relations Board ("NLRB"):

> When an activity is arguably subject to § 7 or § 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of interference with national labor policy is to be averted.

Id. at 245; *see also Hayden v. Reickerd*, 957 F.2d 1506, 1512 (9th Cir. 1992). Preemption under *Garmon* does not require that a plaintiff have a certain remedy before the NLRB, or even that the NLRB will hear the claim in the first place. *Bassette v. Stone Container Corp.*, 25 F.3d 757, 759-60 (9th Cir. 1994). Instead, once a court determines that a plaintiff's claim alleges conduct that is "arguably" or "potentially" subject to § 7 or § 8 of the NLRA, the court is required to defer to the exclusive competence of the NLRB. *Id.* at 760; *Bud Antle, Inc. v. Barbosa*, 35 F.3d 1355, 1361 (9th Cir. 1994).

In this case, Plaintiffs allege that "NASSCO has been utilizing the performance rating system to purposefully low rate handicapped and/or disabled workers which are

then the first to be laid off" in violation of the ADA. Plaintiffs do not expressly allege that NASSCO failed to bargain in good faith in implementing the PECP or that NASSCO otherwise violated any provision of the NLRA. While recognizing that NASSCO's unilateral adoption of the PECP could, under some circumstances, constitute an unfair labor practice, Plaintiffs urge that NASSCO's actions constitute "independent" violations of the ADA.[2] In Plaintiffs' words, their suit "represents the exercise by twenty-four individual workers of their civil right not to be discriminated against by their employer because of their physical limitations."

NASSCO moved for judgment on the pleadings on the basis that the district court was without jurisdiction to hear Plaintiffs' claims. NASSCO insists that consideration of the ADA is not appropriate because the conduct Plaintiffs allege is arguably violative of the NLRA and therefore preempted under *Garmon*. In support of its position, NASSCO relies on cases where the Supreme Court has instructed that when considering *Garmon* preemption, "[i]t is the conduct being regulated, not the formal description of governing legal standard, that is the proper focus of concern." *Amalgamated Ass'n of St., Elec. Ry. &*

---

[2] It is well-established that, after the expiration of a collective bargaining agreement and before negotiations on a new agreement reach impasse, an employer is required to maintain the terms and conditions of employment as set forth in the expired agreement. *Bassette*, 25 F.3d at 760. NASSCO concedes that it unilaterally implemented the PECP, but insists that it did so only after reaching an impasse in its collective bargaining negotiations with the unions.

Motor Coach Employees v. Lockridge, 403 U.S. 274, 292 (1971).

In resolving NASSCO's motion, the district court applied traditional principles of *Garmon* preemption and found that, assuming the truth of Plaintiffs' allegations, NASSCO's conduct would arguably violate § 8 of the NLRA. The court rejected Plaintiffs' argument that the gravamen of their allegations was the violation of their civil rights. The court viewed Plaintiffs' claims as essentially seeking to remedy an unfair labor practice – the unilateral adoption of the PECP – rather than seeking to remedy a discriminatory practice. Thus, the district court concluded that Plaintiffs' state and federal claims were preempted by the NLRA and that NASSCO was entitled to judgment on the pleadings.

C. Applicability of *Garmon* to Plaintiffs' ADA Claims

In applying the *Garmon* preemption doctrine to Plaintiffs' allegations, the district court overlooked that, unlike in *Garmon*, the "conflict" in this case was not between federal and state law, but between two federal statutes.[3] The district court may have lost sight of the fact that *Garmon* preemption originates from the Supremacy Clause of the United States Constitution, and that this

---

[3] In *Garmon*, the Court considered whether a California state court had jurisdiction to award tort damages for activities which constituted an unfair labor practice under California law or whether the sanction of these activities fell within the exclusive jurisdiction of the NLRB. *Garmon*, 359 U.S. at 239.

provision is only implicated when a case involves a conflict between a federal and a state law. *See New York Tel. Co. v. New York Dept. of Labor,* 440 U.S. 519, 539 n. 32 (1979). *Garmon* and its progeny was primarily concerned with the conflict between federal labor policy and state laws. As the *Garmon* Court stated:

> To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by *state law.* . . . [T]o allow the *States* to control conduct which is the subject of national regulation would create potential frustration of national purposes.

Garmon, 359 U.S. at 244 (emphasis added). The *Garmon* court also noted "[o]ur concern is with delimiting areas of conduct which must be free from *state* regulation if *national* policy is to be left unhampered." *Id.* at 246. (emphasis added).[4]

Whether *Garmon* preemption should be extended to preempt a federal, rather than a state, claim is an issue of first impression in this circuit. Nevertheless, the Supreme Court has indicated on several occasions that *Garmon* preemption is not implicated where the potential conflict

---

[4] *See also Viceroy Gold Corp. v. Aubry,* 75 F.3d 482, 490 (9th Cir. 1996) ("The purpose of the *Garmon* rule is 'to preclude *state* interference with the National Labor Relations Board's interpretation and active enforcement of the 'integrated scheme of regulation' established by the NLRA.' ") (quoting *Golden State Transit Corp. v. City of Los Angeles,* 475 U.S. 608, 613 (1986) (emphasis added)); *Alameda Newspapers, Inc. v. City of Oakland,* 95 F.3d 1406, 1412 (9th Cir. 1996); *Bud Antle,* 35 F.3d at 1361.

is with federal law. For example, in *Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67 (1989), the Court held that the district court had jurisdiction to hear a fair representation claim, which is founded solely on substantive federal law, even though the union's breach of their duty of fair representation might have violated § 8 of the NLRA. *Id.* at 78-80. Similarly, in *International Bhd. of Boilermakers v. Hardeman*, 401 U.S. 233 (1971), the Court held that the district court had jurisdiction to hear a claim that the plaintiff's unlawful expulsion from a union violated the Labor-Management Reporting and Disclosures Act, 29 U.S.C. § 411(a)(5) ("LMRDA"), even though the expulsion in that case was arguably an unfair labor practice. *Id.* at 237-39.

In addition to this guidance from the Supreme Court, several of our sister circuits have addressed this issue and concluded that the *Garmon* preemption analysis is inapplicable when the NLRA potentially conflicts with another federal statute. In *United States v. Boffa*, 688 F.2d 919, 931-33 (3rd Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983), the Third Circuit held that *Garmon* did not preempt the court's consideration of a federal criminal statute prohibiting mail fraud.[5] Similarly, in *United States v. International Bhd. of Teamsters*, 948 F.2d 98 (2d Cir. 1991),

---

[5] The *Boffa* court reasoned that when conduct is regulated by two federal statutes, the issue is whether by enacting the NLRA, Congress had intended to repeal the existing statute. *Boffa*, 688 F.2d at 932-33. Because the defendants presented no evidence that Congress intended that repeal the criminal statute at issue, the court held that the federal crime was not preempted. *Id.*

in holding that the district court had jurisdiction to consider a claim under the All Writs Act, 28 U.S.C. § 1651, the Second Circuit stated "where federal laws and policies other than the NLRA are implicated, the *Garmon* rule is frequently considered inapplicable." *Id.* at 105; *see also American Postal Workers Union v. United States Postal Service*, 766 F.2d 715, 720 (2d Cir. 1985) (district court and NLRB have concurrent jurisdiction over suits to enforce labor contracts, "even if the conduct involved might entail an unfair labor practice."), *cert. denied*, 475 U.S. 1046 (1986).

The Fifth Circuit has also recognized that the intersection of two federal statutes involves an analysis distinct from traditional *Garmon* preemption. *Britt v. Grocers Supply Co., Inc.*, 978 F.2d 1441, 1447 (5th Cir. 1992), *cert. denied*, 508 U.S. 960 (1993). In a well-reasoned opinion, the *Britt* court held that because traditional preemption analysis does not apply when two federal statutes conflict, the Age Discrimination In Employment Act, 29 U.S.C. §§ 621-634, was not preempted by the NLRA. *Id.*[6]

Finally, this Court has indicated, on at least one occasion, that *Garmon* preemption is inapplicable to cases involving two federal statutes. In *Brock v. Writers Guild of America*, 762 F.2d 1349 (9th Cir. 1985), this Court rejected the district court's determination that the Secretary of Labor's action under the LMRDA was preempted by the NLRA:

---

[6] *See also Tamburello v. Comm-Tract Corp.*, 67 F.3d 973, 976 n. 2 (1st Cir. 1995), *cert. denied*, 116 S.Ct. 1852 (1996) (noting, without deciding, that *Garmon* preemption doctrine may not apply to conflict involving NLRA and a federal statute).

> We reject the district court's characterization of this issue in terms of "preemption" of the Secretary's authority. The use of the term "preemption" and the court's citation to *[Garmon]* are inapposite. Issues of preemption are implicated where a state has acted in an area which is reserved to the federal government, in violation of the Supremacy Clause. *Garmon* involved a state court's attempt to regulate activity which was arguably subject to the NLRA and within the primary jurisdiction of the NLRB. In contrast, the present action raises questions concerning the overlap of two federal statutes.

Id. at 1352 n. 4 (dicta).

These cases, as well as consideration of the principles which underlie *Garmon* preemption, lead us to conclude that, in cases such as this, where the "conflict" is between two federal statutes, *Garmon* preemption is inapplicable and a federal court may properly retain jurisdiction over non-NLRA federal claims.[7] In reaching this conclusion,

---

[7] We recognize that Plaintiffs' ADA claims may also be said to fall under the well-recognized "collateral issue" exception to *Garmon* preemption. *Garmon*, 359 U.S. at 243; *Bud Antle*, 35 F.3d at 1361; *Hayden*, 957 F.2d at 1512. Under this exception, federal courts may decide labor questions that emerge as collateral issues in suits brought under statutes providing for independent federal remedies. *Connell Constr. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 626 (1975). However, in light of our conclusion that *Garmon* preemption is not implicated in situations where two federal statutes are at issue, it is not necessarily to address the collateral issue exception. *Accord Britt*, 978 F.2d at 1447 ("[T]raditional preemption analysis does not apply in a conflict between two federal statutes."); *Boffa*, 688 F.2d at 931-33; *Hood v. Smith's Transfer Corp.*, 762 F.Supp. 1274, 1283 (W.D. Ky. 1991).

we are guided by the fact that the doctrine of *Garmon* preemption is of constitutional dimension; it is grounded, in part, upon considerations of federal supremacy. No such constitutional concerns are implicated when a federal statute prescribing discriminatory action is said to impinge upon the primary jurisdiction of the NLRB. *See Boffa,* 688 F.2d at 932 (citing *Garmon,* 359 U.S. at 244).

Additionally, the doctrine of NLRB primary jurisdiction is founded on the principle "that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. . . . " *International Bhd. of Boilermakers,* 401 U.S. at 238 (citations omitted). This factor is simply not implicated in the present case. The determination of unlawful discriminatory employment practices is hardly a question beyond "the conventional experience of judges," nor can it be said to raise issue "within the special competence of the NLRB." *Id.* at 238-39 (citations omitted).

In short, we find little reason why *Garmon* should be extended to cover cases involving the overlap of two federal statutes, and preclude the enforcement of a federal act which expressly prescribes the conduct alleged by a plaintiff.[8] Just as federal courts are ill-equipped to

---

[8] In concluding that *Garmon* preemption does not apply in this case, we do not disturb prior decisions of this Court which have held that *Garmon* will preempt a federal claim when that federal claim depends upon the NLRA to state the federal cause of action. *See, e.g., Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.,* 779 F.2d 497 (9th Cir. 1985),

displace the role of the NLRB, the NLRB is not-suited to balance the competing federal interests presented by these two statutes. To permit the NLRB to decide claims in which an employer's reasonable accommodation may violate the NLRA would leave the interpretation of the ADA to the NLRB. This judicial function certainly exceeds that agency's expertise and authority. Instead, the careful balancing of these two statutes should be left to the federal courts, who may properly consider the requirements imposed on a employer by the NLRA when determining whether the employer has provided a reasonable accommodation.[9] Finally, and perhaps most importantly, we note that preemption in this case would leave disabled union employees who are the victims of unlawful discrimination without recourse to the federal

---

aff'd, 484 U.S. 539 (1988); *Cement Masons Health & Welfare Trust Fund v. Kirkwood-Bly, Inc.*, 520 F.Supp. 942 (N.D.Cal. 1981), *aff'd*, 692 F.2d 641 (9th Cir. 1982). In these cases, the existence of the non-NLRA federal claim depended entirely on a threshold determination that a violation of the NLRA had occurred. *Laborers Health & Welfare Trust Fund*, 779 F.2d at 504 (ERISA claim preemption under *Garmon* because adjudication of ERISA claim "depends entirely on the section 8(a)(5) [of the NLRA] determination"); *Cement Masons*, 520 F.Supp. at 944 (plaintiffs' suit under Labor Management Relations Act "depends entirely" on NLRA). Here, the determination of whether NASSCO's policy violates the ADA does not require any reference to the NLRA.

[9] Federal courts may refer to a published 1992 memorandum by General Counsel of the NLRB which discusses many of the potential conflicts between the NLRA and the ADA. NLRB Gen. Cons. Mem. 92-9 (Aug. 7, 1992), reprinted in 1993 WL 407395 (N.L.R.B.G.C.). Courts may also seek the input of the NLRB as *amicus curiae*. Thus, the NLRB will not be left without a voice in the decision-making process.

forum which Congress sought to provide. We hesitate to deny this avenue of relief to plaintiffs in the absence of any indication that the issues presented in such suits were intended to be reserved for exclusive adjudication by the NLRB.

IV

CONCLUSION

We find that Plaintiffs' ADA claims present policy implications which render traditional principles of *Garmon* preemption inapplicable. We therefore hold that to the extent that Plaintiffs' ADA claims encompass conduct that is arguably covered by the NLRA, the ADA governs the prosecution of these claims and not the NLRA. Accordingly, the district court erred in granting NASSCO's motion for judgment on the pleadings. The decision of the district court is **REVERSED** and the case **REMANDED** for further proceedings.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OSCAR SMITH; MARK DRISCOLL; JOHN PARASKEVOPOULOS; GEORGE LOPEZ; JUAN P. CUBILLAS; JUAN MARQUEZ; MICHAEL RAY NASH; HECTOR MANUEL NAVARRO; STEVE HARDING; IRMA CAMACHO; IRMA DURAZO; WILLIAM N. JORDAN; STANLEY E. TURNER; ROMEO DELEON; FRANCISCO BARRON; OSCAR NEVAREZ; ROBERT J. GILL; EDUARDO LENCIONI; PERRY MASTAW; ANTONIO MORALEZ; RODNEY RAMSEYER; MARIO CASTRO; and NORRIS FISHMAN,

Plaintiffs-Appellants,

v.

NATIONAL STEEL & SHIPBUILDING COMPANY,

Defendant-Appellee.

No. 96-55281

D.C. No. CV-94-01029-JSR

ORDER

(Filed Oct. 28, 1997)

Before: BROWNING and KLEINFELD, Circuit Judges, and MERHIGE,* Senior District Judge.

* Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

The panel has unanimously voted to deny the Appellants' petition for rehearing. The suggestion for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX C

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

OSCAR SMITH, et al. Plaintiff, v. NATIONAL STEEL & SHIPBUILDING CO., and DOES 1 through 500, inclusive, Defendants.	CIVIL NO. 94-1029-R (CGA) ORDER GRANTING DEFENDAT'S MOTION FOR JUDGMENT ON THE PLEADINGS (Filed Jan. 23, 1996)

This matter is before the Court on Defendant National Steel & Shipbuilding Company's ("NASSCO") motion for judgment on the pleadings or alternatively for summary judgment. NASSCO argues that Plaintiffs' complaint is preempted by the National Labor Relations Act ("NLRA") and that the National Labor Relations Board ("NLRB") has exclusive jurisdiction. For the reasons state [sic] below, Defendants motion is granted.

I. Background

On June 15, 1994, Plaintiffs filed a complaint in the San Diego County Superior Court alleging that they were laid off by NASSCO on the basis of physical disability/ medical condition in violation of the California Fair Employment and Housing Act ("FEHA") and the Americans with Disabilities Act ("ADA"). On July 1, 1994, NASSCO removed the action to this Court on the basis of

its original jurisdiction over claims under the ADA. Thereafter, the parties stipulated to consolidate this action with Case No. 94-1482.

Plaintiffs allege that they are handicapped or disabled persons. Compl. at ¶ 6. NASSCO allegedly abandoned its seniority policy and adopted a performance based rating system for purposes of determining who should be laid off during layoff periods. *Id.* at ¶ 9. Plaintiffs contend that the new performance rating system has been used, and misused, to purposefully lay off handicapped and/or disabled workers. *Id.* at ¶¶ 11 & 17. NASSCO states that the performance rating system to which Plaintiffs refer is the Performance Evaluation and Communication Program ("PECP"), which NASSCO implemented on April 27, 1993. *See* Dft.'s Mot. at 3:24-27.

The PECP provides in part:

> A light duty or restricted duty employee who is doing work within his/her trade's job description, will be rated just as any other employee. An employee who is working outside of his/her trade's job description due to limitations or restrictions imposed by his/her doctor will be frozen until he/she resumes work in his/her trade.

See Compl. at ¶ 10; Carl Hinrichsen Decl. Ex. A at 26. Plaintiffs do not assert that NASSCO failed to "bargain collectively" or failed to bargain in "good faith" in implementing the PECP. Pls.' Memo. at 2:9-10. Rather, Plaintiffs argue that although they were working outside their usual job classification due to medical restrictions imposed by their physicians, "each Plaintiff was low rated . . . in violation of the PECP." *Id.* at 3:4-5. Although

Plaintiffs purport to challenge the PECP as facially discriminatory, their complaint alleges a *violation* of the PECP with respect to each named Plaintiff.

Arguing that Plaintiffs' claims are preempted by the NLRA, NASSCO has moved for judgment on the pleadings or alternatively for summary judgment.

II. Discussion

A. Applicable Legal Standard

NASSCO brings this motion pursuant to Federal Rule of Civil Procedure 12(c) which provides:

> After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Fed.R.Civ.P. 12(c). In the present case, this Court excludes matters outside the pleadings.[1] "Judgment on the

---

[1] Since the PECP is referred to in the complaint, (*see* Compl. ¶ 10), consideration of the PECP (attached as Ex. A to Carl Hinrichsen's Decl.) does not convert this motion into one for summary judgment. *Cf. Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). However, even if this Court did consider this motion as one for summary judgment, for the reasons stated below, the motion would be granted.

pleadings is proper when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law." *Hal Roach Studios v. Richard Feiner and Co.*, 896 F.2d 1542, 1550 (9th Cir. 1990).

B. Preemption

The National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.*, preempts any claim based on conduct protected or prohibited by the NLRA. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). In fact, when conduct "arguably" is prohibited by § 7 or § 8 of the NLRA, federal courts must yield jurisdiction to the NLRB. *Id.* at 244. Under the NLRA, the NLRB, not federal courts, must decide whether a claim involves conduct arguably protected by § 7 or § 8. *Id.* at 244-45. Once this Court determines that a claim alleges conduct that "arguably" is subject to section 7 or section 8 of the NLRA, "the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board." *Bassette v. Stone Container Corp.*, 25 F.3d 757, 760 (9th Cir. 1994) (quoting *Garmon*, 359 U.S. at 245).

In *Bassette*, after a collective bargaining agreement expired and negotiations reached an impasse, the employer implemented the terms and conditions of the last and final offer it had presented to the plaintiff's Union during negotiations. 25 F.3d at 759. After the plaintiff was terminated, she brought an action alleging "conduct that would constitute a violation of a term" that the employer "properly implemented after impasse." *Id.* at 761. The Ninth Circuit held that such conduct, if true,

"would violate an employer's duties under section 8 of the NLRA." *Id.* Thus, the court concluded that the action was preempted by the NLRA.

The central dispute on NASSCO's instant motion for judgment on the pleadings is not a factual one but rather whether the NLRA preempts Plaintiffs' claims. Plaintiffs allege that NASSCO, "unilaterally, and without consent of the employees, abandoned the seniority policy and adopted the" PECP. Compl. at ¶ 10. Plaintiffs then go on to allege that NASSCO violated the PECP with respect to each Plaintiff. As in *Bassette,* if Plaintiffs' allegations are true, such conduct would violate section 8 of the NLRA. That determination is reserved exclusively to the NLRB by the NLRA. Thus, Plaintiffs' claims, state and federal, are preempted by the NLRA.[2]

C. Plaintiffs' ADA Claims Are Preempted

Plaintiffs attempt to save their complaint from preemption by arguing that the NLRA does not preempt federal claims, particularly Plaintiffs' "Civil Rights" claims under the ADA. Plaintiffs rely on the cases *Pelech v. Klaff-Joss, LP,* 828 F. Supp. 525 (N.D. Ill. 1993) and *De Malherbe v. Int'l Union of Elevator Constructors,* 438 F. Supp. 1121 (N.D. Cal. 1977), which held that certain civil

---

[2] Indeed, Plaintiffs concede that their claims would arguably "be preempted by the NLRA had they been based solely on a state law claim pursuant to the *Garmon* doctrine." Pls.' Opp'n at 9:23-25. As discussed below, the fact that Plaintiffs also allege federal claims does not change the preemption analysis under *Garmon.*

rights claims were not preempted by the NLRA. Those cases, however, do not apply to the facts of this case. Notwithstanding Plaintiffs' assertion that NASSCO violated their "Civil Rights protected under the ADA," (Pls.' Opp'n at 7:19-20), Plaintiffs' claims are not civil rights claims under Title VII, like those at issue in *Pelech* and *Malherbe*.[3]

Moreover, unlike the legislative history of Title VII, *see Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44-49 & n.9 (1974), the legislative history of the ADA does not reflect congressional consideration of the potential conflicts between the requirements of the ADA and the NLRA. The ADA provides, however, that none of its provisions "shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law. . . ." 42 U.S.C. § 12201(b). Where, as here, there is a "lack of useful statutory or congressional guidance," the question must be resolved under "accepted labor law principles." *Laborers' Health & Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co., Inc.*, 779 F.2d 497, 504 (9th Cir. 1985), *aff'd*, 484 U.S. 539 (1988). The accepted principles of labor law preemption, as established in *Garmon*, provide that where the alleged conduct arguably violates the NLRA, the matter is preempted.

In the instant case, as discussed above, Plaintiffs' complaint alleges conduct that arguably violates the NLRA and is therefore within the exclusive jurisdiction of

---

[3] Answering Plaintiffs' suggestion that the *Garmon* doctrine does not apply to federal claims, NASSCO cites several cases in which courts have held the broad NLRA preemptive force to apply to a variety of federal claims. *See* Dft.'s Reply at 7:12-8:7.

the NLRB. Plaintiffs cannot evade NLRA preemption by seeking relief under the ADA for conduct which "arguably" violates the NLRA. "[T]he preemption question turns not on the characterization of the action but on the nature of the activity called into question: is it arguably protected by the NLRA? This is not a matter than [sic] can be manipulated by the selection of a state or federal cause of action." *Rodriguez v. Yellow Cap Coop., Inc.*, 206 Cal. App. 3d 668, 680 (1988).

Judgment on the pleadings is proper since NASSCO has clearly established on the face of the pleadings that no material issue of fact remains to be resolved and that NASSCO is entitled to judgment as a matter of law.

III. Conclusion

For the reasons stated above, NASSCO is entitled to judgment on the pleadings.

IT IS SO ORDERED:

Date: 1/22/96

/s/ John S. Rhoades
John S. Rhoades, Sr.
United States
District Judge

Copies to:

All Parties

APPENDIX D

RELEVANT STATUTORY PROVISIONS

United States Code, Title 29:

Section 157

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 158

> (a) Unfair labor practices for an employer
>
> It shall be an unfair labor practice for an employer –
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranted in section 157 of this title;
>
> * * *
>
> (5) to refuse to bargain collectively with the representative of his employees, subject to the provisions of section 159(a) of this title.

Section 160

> (a) Powers of Board generally
>
> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title)

affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . .

United States Code, Title 42:

Section 12101

* * *

(b) Purpose

It is the purpose of this chapter –

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Section 12102

As used in this chapter:

* * *

(2) Disability

The term "disability" means, with respect to an individual –

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individuals;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

Section 12112

(a) General Rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes –

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with such a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an

employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration –

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless

the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

Section 12117

(a) Powers, remedies, and procedures

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

Section 12201

(b) Relationship to other laws

Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State

or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter. Nothing in this chapter shall be construed to preclude the prohibition of, or the imposition of restrictions on, smoking in places of employment covered by subchapter I of this chapter, in transportation covered by subchapter II or III of this chapter, or in places of public accommodation covered by subchapter III of this chapter.

No. 97-1218

FILED
MAR 24 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1997

NATIONAL STEEL AND SHIPBUILDING COMPANY,

Petitioner,

vs.

OSCAR SMITH; MARK DRISCOLL; JOHN PARASKEVOPOULOS; GEORGE LOPEZ; JUAN P. CUBILLAS; JUAN MARQUEZ; MICHAEL RAY NASH; HECTOR MANUEL NAVARRO; STEVE HARDING; IRMA CAMACHO; LUIS BARCELO DURAZO; WILLIAM N. JORDAN; STANLEY E. TURNER; ROMEO DELEON; FRANCISCO BARRON; OSCAR NEVAREZ; ROBERT J. GILL; EDUARDO LENCIONI; PERRY MASTAW; ANTONIO MORALEZ; RODNEY RAMSEYER; MARIO CASTRO and NORRIS FISHMAN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

RUDY HUERTA LÓPEZ
IRWIN M. ZALKIN*
LAW OFFICES OF
IRWIN M. ZALKIN
Attorneys for Respondents
225 Broadway, Suite 890
San Diego, California 92101
(619) 234-2366

* *Counsel of Record*

145475

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, inc.

18 pp

QUESTIONS PRESENTED FOR REVIEW

Whether claims premised upon violations of the Americans with Disabilities Act brought forth by individual workers can be pursued in federal court against a unionized employer, just as any other civil rights claim, or are such claims within the exclusive jurisdiction of the National Labor Relations Act.

PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding with the exception of Irma Camacho. Petition incorrectly lists Respondent as Irma Camacha.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Citations	iv
Statement of the Case	1
A. Statement of Facts	1
Proceedings Below	2
Reasons for Denying the Writ	4
I. Petitioner Fails To Set Forth Compelling Reasons For This Court To Grant Its Petition For Writ Of Certiorari.	4
II. Contrary To Petitioners Attempts To Misconstrue Respondents' Claims, The True Gravamen Of Plaintiffs' Complaints Is That The PECP Is A "Standard, Criteria Or Method Of Administration That Has The Effect Of Discrimination On The Basis Of Disability Or Perpetuates Discrimination On That Basis" In Violation Of The Americans With Disabilities Act.	5
III. The Ninth Circuit Was Correct In Ruling That The *Garmon* Preemption Doctrine Does Not Apply	

Contents

Page

In The Instant Matter Because Respondents' Claims Are Grounded On Violations Of The ADA And Not On Violations Of The NLRA. 7

IV. Where Two Federal Statutes Are Alleged To Be In Conflict, Preemption Becomes A Matter Of Congressional Intent. 10

Conclusion 12

TABLE OF CITATIONS

Cases Cited:

Brennan v. Chestnut, 777 F. Supp. 1469 (D. Minn. 1991) 9

Butchers' Union, Local No. 498 v. SDC Investment, Inc., 631 F. Supp. 1001 (E.D. Cal. 1986) 9

Chamber of Commerce v. Reich, 83 F.3d 439 (1996) . 8

Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100, etc., 421 U.S. 616 (1975) .. 8

Crown Clothing Co. v. Papale, 854 F. Supp. 316 (D. N.J 1994) 9

Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co. Inc., 779 F.2d 497 (1985) 8

Contents

	Page
MHC, Inc. v. International Union, United Mine Workers, 685 F. Supp. 1370 (E.D. Ky. 1988)	9
Morgan v. Massachusetts General Hospital, 901 F.2d 186 (1990)	8
New Bedford Fisherman's Welfare Fund v. Baltic Enterprises Inc., 813 F.2d 503 (1987)	8, 9
San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S. Ct. 773 (1959)	4, 5, 7, 8, 9, 10
Talbot v. Robert Matthews Distributing Co., 961 F.2d 654 (1992)	9
Tamburello v. Comm-Tract Corp., 67 F.3d 973 (1995)	8
Statutes Cited:	
29 U.S.C. § 151, *et seq.*	2
42 U.S.C. § 12101, *et seq.*	2
42 U.S.C. § 12112	6, 11
United States Constitution Cited:	
U.S. Constitution, Art. IV, Cl. 2	7
Other Authorities Cited:	
Section 102 of the Americans with Disabilities Act	5, 10
Section 102(b)(3) of the Americans with Disabilities Act	5

STATEMENT OF THE CASE

A. Statement of Facts

Until September 30, 1992, NASSCO was a union shop operating under the terms of a collective bargaining agreement with seven different unions. Since the expiration of that agreement on September 30, 1992, NASSCO and the unions have been engaged in collective bargaining.

Typical to the shipyard industry are periods of lay offs during slow downs in production. Under the previous bargaining agreement layoffs were determined by seniority. On April 27, 1993, NASSCO unilaterally changed this previous policy and instituted a performance based rating system referred to as the Performance Evaluation and Communication Program, ("PECP"). In part, the PECP provides:

> **A light or restricted duty employee who is doing work within his/her trade's job description, will be rated just as any other employee.** An employee who is working outside of his/her trade's job description due to limitations or restrictions imposed by his/her doctor, will be frozen until he/she resumes work in his/her trade.

(Emphasis added).

As a matter of policy, therefore, a welder, shipfitter, painter or carpenter who can do substantially the whole of their job requirements will not be provided any accommodation should they have a disability. They will be expected to perform exactly as the able bodied worker without any consideration for their disability and will be rated accordingly. If they can do their job but cannot, for instance, stand as long, bend down as far, breathe

as well, lift as frequently, they can (and undoubtedly will) be down rated with respect to their productivity. Once Petitioner instituted this policy, workers with job injuries, or non-industrial disabilities, were systematically low rated and the first to be laid off during lay off periods pursuant to the PECP. Thus, the PECP is being used by Petitioner as a tool to carry out discriminatory practices in violation of the Americans with Disabilities Act, ("ADA"), 42 U.S.C. § 12101, *et seq.*

PROCEEDINGS BELOW

Respondents' claims are grounded upon Petitioner's discrimination against Respondents due to their physical limitations in violation of the ADA. Respondents allege that *Petitioner has used the PECP as a vehicle to discriminate against disabled and injured workers in violation of the ADA.* Respondents mention in their complaints, that they have been laid off in violation of the PECP *because the PECP is discriminatory on its face.* Each Respondent was low rated and laid off due to their physical disabilities even when they were supposedly "accommodated" with light or restricted duty within their trade's job description.

Thus, Petitioner errs in characterizing Respondents' claims as being based on its failure to bargain in good faith in enacting the PECP, or on the contention that its low rating workers in violation of its own PECP is a breach of a term or condition of employment which is an action within the exclusive jurisdiction of the National Labor Relations Act, ("NLRA"), 29 U.S.C. § 151, *et seq.* The fact that the PECP was unilaterally enacted has absolutely no bearing on the true substance of Respondents' claims. On the other hand, the fact that Petitioners have used this PECP to discriminate against disabled workers, does. Thus, Respondents' position is that *to allow Petitioner to use this PECP to carry out this discrimination in violation of the ADA would literally nullify the purpose and goals of the ADA.*

Thus, although it may be true that Petitioner failed to bargain in good faith, which in turn enables the union to pursue an unfair labor practice charge with the National Labor Relations Board, ("NLRB"), this complaint represents the exercise of Respondents' right to not be discriminated against by Petitioner because of their physical limitations — a fundamental right protected solely by the Americans with Disabilities Act.

Petitioner moved for judgment on the pleadings or in the alternative for summary judgment. The district court viewed Respondents' claims as essentially seeking to remedy an unfair labor practice rather than seeking to remedy a discriminatory practice and thus, dismissed Respondents' claims. The district court further recognized that Title VII civil rights claims are not subject to preemption by the NLRA, yet held that the ADA is not a civil rights statute.

Respondents timely appealed the district court's decision. A unanimous Ninth Circuit panel reversed. In an opinion by the Hon. Robert R. Merhige, Jr., Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation, the Appellate Court recognized that when the courts are presented with sensitive issues of national labor policy it is best to leave resolution of such issues to the administrative agencies created by Congress for that purpose, such as the NLRB. However, the Appellate Court opined that such was not the case in the instant matter. The Appellate Court noted that the determination of unlawful discriminatory employment practices is hardly a question beyond the conventional experience of judges, nor does it raise issue within the special competence of the NLRB.

> Just as federal courts are ill-equipped to displace the role of the NLRB, the NLRB is not-suited to balance the competing federal interests presented by these two statutes. **To permit the NLRB to decide claims**

> **in which an employer's reasonable accommodation may violate the NLRA would leave the interpretation of the ADA to the NLRB.** This judicial function certainly exceeds that agency's expertise and authority . . . Finally, and perhaps most importantly, we note that preemption in this case would leave disabled union employees who are the victims of unlawful discrimination without recourse to the federal forum which Congress sought to provide.

(*See* Pet. App. A, 12-13 (emphasis added)).

The Court of Appeals further unanimously denied a petition for rehearing. Petitioner's suggestion for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration. (*See* Pet. App. B).

REASONS FOR DENYING THE WRIT

I.

PETITIONER FAILS TO SET FORTH COMPELLING REASONS FOR THIS COURT TO GRANT ITS PETITION FOR WRIT OF CERTIORARI.

In the instant matter, Petitioner has failed to set forth any compelling reason for its petition for writ of certiorari to be heard. The Petition misinterprets the opinion of the unanimous Ninth Circuit panel. The Ninth Circuit did not hold, as Petitioner would have it, that *Garmon, infra*, preemption never applies when a federal claim is involved. On the contrary, the Appellate Court acknowledged that *Garmon* principles can apply to federal statutes when the statutory claim turns on an allegation of an activity the NLRA makes illegal. It went on to cite prior

Supreme Court and other appellate court decisions where two federal statutes were involved and *Garmon* preemption was not applied. Thus, after having reviewed the facts as plead, the Ninth Circuit held that Respondent's claims herein are grounded on violations of the ADA and not on violations of the NLRA.

The Appellate Court, therefore, is not departing from an established rule. The *Garmon* preemption doctrine has not been applied in a manner that is either, inconsistent, nor conflicts, with any decision of this Court and other courts of appeals, and therefore, this writ should be denied.

II.

CONTRARY TO PETITIONERS ATTEMPTS TO MISCONSTRUE RESPONDENTS' CLAIMS, THE TRUE GRAVAMEN OF PLAINTIFFS' COMPLAINTS IS THAT THE PECP IS A "STANDARD, CRITERIA OR METHOD OF ADMINISTRATION THAT HAS THE EFFECT OF DISCRIMINATION ON THE BASIS OF DISABILITY OR PERPETUATES DISCRIMINATION ON THAT BASIS" IN VIOLATION OF THE AMERICANS WITH DISABILITIES ACT.

Section 102 of the Americans with Disabilities Act ("ADA"), states,

> (a) No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) As used in subsection (a) of this section, the term **"discriminate"** includes —

(3) **utilizing standards, criteria, or methods of administration** —

(A) that have the **effect** of **discrimination** on the basis of **disability**; or

(B) that **perpetuate the discrimination** of others who are subject to common administrative control; (42 U.S.C. § 12112)

Petitioner has attempted to misconstrue Respondents claims by focusing on the fact that Respondents mention that Petitioner unilaterally enacted the PECP. This was merely a factual statement made for the purpose of showing how the PECP was enacted. Respondents are not, nor ever have, complained that Petitioner failed to bargain in good faith in violation of the NLRA, nor that Petitioner has violated some term or condition of employment which is an action within the exclusive jurisdiction of the NLRA.

Respondents allege that the PECP is discriminatory on its face, and that as defined in § 102(b)(3) of the ADA, *supra*, the PECP is, "a standard, criteria or method of administration that has the effect of discrimination, or perpetuates discrimination on the basis of disability." Petitioner, nevertheless, continues to purposefully twist the gravamen of Respondents claims in an effort to avoid addressing the actual issues involved in this matter.

III.

THE NINTH CIRCUIT WAS CORRECT IN RULING THAT THE *GARMON* PREEMPTION DOCTRINE DOES NOT APPLY IN THE INSTANT MATTER BECAUSE RESPONDENTS' CLAIMS ARE GROUNDED ON VIOLATIONS OF THE ADA AND NOT ON VIOLATIONS OF THE NLRA.

As mentioned above, Petitioner has continuously misconstrued Respondents' allegations. Respondents have firmly argued throughout that their ADA claims are not preempted by the NLRA under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S. Ct. 773 (1959). First, it is well established that *Garmon* has been interpreted to address conflict between state and even federal systems for regulating labor activity, however, it has not been applied to preempt federal claims premised upon ADA violations.

Petitioner seems to suggest that *Garmon*, although rooted in the Supremacy Clause of the U.S. Constitution, Art. IV, Cl. 2, has been extended to cover not only conflict between federal and state laws, but also conflicts between any two federal statutes. However, *Garmon* preemption has only been applied to conflicting state laws regarding the regulation of labor activities, and at times, to other federal statutes which overlap **in the area of labor activity regulation made illegal by virtue of the NLRA**. The NLRA, however, has not been extended to preempt federal statutes which prohibit discrimination on the basis of race, gender or even physical disabilities.

The unanimous Ninth Circuit panel did not hold that *Garmon* preemption never applies when a federal claim is involved. On the contrary, the Appellate Court acknowledged that when a federal claim is premised upon conduct made illegal

by virtue of the NLRA, *Garmon* principles can apply. The Appellate Court, however, did not feel that such was the case in the instant matter. Thus, the question presented in this case is not a broad based legal question, but rather a narrow question of how to characterize these particular claims.

Petitioner cites various cases supposedly involving a conflict between the NLRA and another federal statute. However, upon close review, it is apparent that the cases do not apply to the instant matter because the plaintiff involved specifically alleged labor activity violations which are illegal by virtue of the NLRA, unlike in the instant matter, where the claims brought forth by Respondents are illegal by virtue of the Americans with Disabilities Act. *See, e.g., Tamburello v. Comm-Tract Corp.*, 67 F.3d 973 (1995) (Plaintiff specifically alleged harassment by his employer as a result of his union activities as a union steward.); *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100, etc.*, 421 U.S. 616 (1975) (Defendant building trades union supported its efforts to organize mechanical subcontractors by picketing the plaintiff general building contractor, and defendant sought relief under the Sherman Act.); *Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co. Inc.*, 779 F.2d 497 (1985) (Trust fund filed suits against employer seeking unpaid contributions from the date expiration of the collective bargaining agreements.); *Chamber of Commerce v. Reich*, 83 F.3d 439 (1996) (Plaintiffs brought actions for declaratory and injunctive relief challenging an Executive Order authorizing the Secretary of Labor to disqualify from certain federal contracts, employers who hired permanent replacement workers during a lawful labor strike.); *Morgan v. Massachusetts General Hospital*, 901 F.2d 186 (1990) (Plaintiff alleged that in addition to his race, he was not promoted for thirteen years because of his union activities within the hospital where he worked.); *New Bedford Fisherman's Welfare Fund v. Baltic*

Enterprises Inc., 813 F.2d 503 (1987) (Plaintiffs initiated an action in federal court seeking to compel Defendant's payment of delinquent contributions under the terms of an expired collective bargaining agreement until the parties reached an impasse in negotiations.); *Talbot v. Robert Matthews Distributing Co.*, 961 F.2d 654 (1992) (Plaintiffs brought action alleging common-law fraud and misrepresentation, as well as violations of the Labor Management Relations Act and RICO.); *Brennan v. Chestnut*, 777 F. Supp. 1469 (D. Minn. 1991) (Plaintiffs who were pilots and shareholders in a labor organization brought RICO claims against labor organization claiming mail fraud, wire fraud and extortion.); *Butchers' Union, Local No. 498 v. SDC Investment, Inc.*, 631 F. Supp. 1001 (E.D. Cal. 1986) (Plaintiff labor unions brought RICO action against employer who was allegedly paying representative of labor organization in order to influence exercise of collective bargaining rights in violation of the Labor Management Relations Act.); *Crown Clothing Co. v. Papale*, 854 F. Supp. 316 (D. N.J 1994) (Plaintiff employer claimed that the union illegally conspired to use withdrawal liability under the Multiemployer Pension Plan Amendment Act as a bargaining chip in labor negotiations.); *MHC, Inc. v. International Union, United Mine Workers*, 685 F. Supp. 1370 (E.D. Ky. 1988) (Plaintiffs brought Civil RICO action to recover for union and union members' alleged conspiracy to deprive them of property rights through their illegal picketing and multiple acts of violence.).

Despite Petitioner's efforts to argue that the Court of Appeals Opinion conflicts with the decisions of this court and other federal courts of appeals that have applied traditional principles of *Garmon* preemption when the conflict is between the NLRA and another federal statute, it is evident that because Respondents have alleged discrimination on the basis of their physical disabilities in violation of the ADA, and at no time, have alleged any violation of the NLRA, the Ninth Circuit decision was

correct and thus, *Garmon* principles of NLRA preemption do not apply in the instant matter.

IV.

WHERE TWO FEDERAL STATUTES ARE ALLEGED TO BE IN CONFLICT, PREEMPTION BECOMES A MATTER OF CONGRESSIONAL INTENT.

In the instant matter, Petitioner is arguing that *Garmon* principles of NLRA preemption are applicable to claims brought forth by individuals pursuant to violations of the ADA. Petitioner seems to suggest that whenever an ADA claim brings into question the employer's relationship with the union, the NLRA is automatically implicated and thus, the NLRB has exclusive jurisdiction. However, when resolving an issue of conflict between two federal statutes, preemption becomes a question of Congressional intent. It cannot be assumed that Congress intended to repeal part of one statute over another, unless Congress so states. Therefore, both statutes must be construed in a manner that preserves them both.

In the instant matter, it is obvious that Congress recognized that its various civil rights statutes, including the ADA, would be enforced in a workplace where an employer and a union are engaged in collective bargaining. Thus, Congress ensured, within the statutory language of the ADA, that collective bargaining agreements would be regulated.

Section 102 of the ADA states,

> (a) No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement ,

> or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.
>
> (b) As used in subsection (a) of this section, the term "discriminate" includes —
>
> > (2) **participating in a contractual or other arrangement** or relationship **that has the effect** of subjecting a covered entity's qualified applicant or employee with a disability to the **discrimination** prohibited by this title (such relationship includes a relationship with a[] . . . **labor union** . . .

42 U.S.C. § 12112.

For instance, Petitioner is arguing that whenever an employer's rules may have been violated or implemented improperly, (*i.e.*, enacting the PECP, whether unilaterally or not), the NLRA is implicated and hence, a claim premised upon ADA violations cannot be brought. To so hold would literally nullify the ADA in the context of collective bargaining agreements, something which Congress, as noted above, obviously had not intended.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that NASSCO's petition for writ certiorari be denied.

Respectfully submitted,

RUDY HUERTA LÓPEZ
IRWIN M. ZALKIN*
LAW OFFICES OF
IRWIN M. ZALKIN
Attorneys for Respondents
225 Broadway, Suite 890
San Diego, California 92101
(619) 234-2366

* *Counsel of Record*

No. 97-1218

Supreme Court, U.
FILED
APR 7 1998
CLERK

In The

Supreme Court of the United States

October Term, 1997

NATIONAL STEEL AND SHIPBUILDING COMPANY,

Petitioner,

vs.

OSCAR SMITH; MARK DRISCOLL; JOHN PARASKEVOPOULOS; GEORGE LOPEZ; JUAN P. CUBILLAS; JUAN MARQUEZ; MICHAEL RAY NASH; HECTOR MANUEL NAVARRO; STEVE HARDING; IRMA CAMACHA; LUIS BARCELO DURAZO; WILLIAM N. JORDAN; STANLEY E. TURNER; ROMEO DELEON; FRANCISCO BARRON; OSCAR NEVARAZ; ROBERT J. GILL; EDUARDO LENCIONI; PERRY MASTAW; ANTONIO MORALEZ; RODNEY RAMSEYER; MARIO CASTRO; and NORRIS FISHMAN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

VAN ALLYN GOODWIN
LITTLER MENDELSON, P.C.
701 "B" Street, 13th Floor
San Diego, California 92101
(619) 232-0441

Counsel of Record

WILLIAM C. WRIGHT
LITTLER MENDELSON, P.C.
701 "B" Street, 13th Floor
San Diego, California 92101
(619) 232-0441

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

4 pp

REPLY TO BRIEF IN OPPOSITION

Petitioner National Steel and Shipbuilding Company (hereinafter referred to as "Petitioner" or "NASSCO") respectfully submits the within Reply To Respondents' Brief In Opposition to the Petition For Writ of Certiorari in the above-captioned case.

RESPONDENTS HAVE MISLEAD THIS COURT ABOUT THEIR CLAIMS IN THIS ACTION IN A DESPERATE ATTEMPT TO AVOID *GARMON* PREEMPTION

Respondents have purposefully distorted and patently misrepresented their claims in this matter in a desperate attempt to avoid preemption of their claims in this action under the principles established by this Court in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). Respondents' Brief In Opposition falsely states that they "mention in their complaints, that they have been laid off in violation of the PECP *because the PECP is discriminatory on its face*" (Resp. Brief. at 2) and that "Respondents alleged that the PECP is discriminatory on its face . . . " (Resp. Brief at 6).

No such allegations or claims are contained in any of the Complaints that Respondents filed with the courts below. On the contrary, throughout their Complaints, the specific allegation is that Respondents were

> . . . low rated utilizing the [PECP] in complete disregard of NASSCO's policies and procedures, and in violation of that policy [in the PECP] which provides that no rating will be issued for an injured worker who is on 'light duty' outside

> of his normal classification and [NASSCO] used this low rating as a basis to lay off [Respondents].

This identical allegation is repeated in the Complaints herein by each of the Respondents.

Respondents have purposefully misrepresented the claims pled in their Complaints in hopes of convincing this Court that the fundamental issues of national labor policy presented by the Petition are illusory or non-existent. Petitioner has **not**, as Respondent suggests, "purposefully twist[ed] the gravamen of Respondents' claims" to create a basis for *Garmon* preemption. To the contrary, it is Respondents who seek to twist the true nature of their claims. **There is absolutely no allegation in any of the Complaints filed by Respondents herein that the PECP is facially discriminatory or violative of the ADA, nor any allegation which can be fairly read to so claim.** Rather, Respondents have each clearly alleged in their Complaints that they were laid off by NASSCO **in violation of the unilaterally implemented PECP and the policies of NASSCO.** These allegations unquestionably constitute an arguable unfair labor practice under Section 8(a)(5) of the National Labor Relations Act [29 U.S.C. § 158(a)(5)]. Thus, Respondents' claims are preempted by the provisions of the NLRA under the fundamental principles of national labor policy established by this Court in *Garmon*.

This Court should not be deceived by Respondents' blatant, self-interested and outrageous misrepresentation of their claims. Respondents' claims are singularly and unmistakably premised upon a threshold determination

that NASSCO engaged in conduct that arguably violates Section 8 of the NLRA.

CONCLUSION

For the reasons expressed herein and previously, NASSCO respectfully requests that its petition for a writ of certiorari be granted.

Respectfully submitted,

WILLIAM C. WRIGHT
VAN ALLYN GOODWIN*

Counsel for Petitioner

**Counsel of Record*